Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1976

No. 76-217

ANDREW L. STONE and M. JEANNE STONE,

Petitioners.

vs.

UNITED STATES OF AMERICA and DISTRICT DIRECTOR OF INTERNAL REVENUE, MANHATTAN DISTRICT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

WALLACE MUSOFF
BARRY D. GORDON
Attorneys for Petitioners
136 East 57th Street
New York, New York 10022
(212) 753-2900

9421

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In The

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No.

ANDREW L. STONE and M. JEANNE STONE,

Petitioners,

vs.

UNITED STATES OF AMERICA and DISTRICT DIRECTOR OF INTERNAL REVENUE, MANHATTAN DISTRICT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Andrew L. Stone and M. Jeanne Stone, pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, entered on May 24, 1976, affirming the order of the United States District Court, Southern District of New York, dismissing petitioners' complaint for lack of subject matter jurisdiction.

OPINION BELOW

The order of the Court of Appeals is reproduced in Appendix A of this petition. The opinion of the United States District Court, Southern District of New York is officially reported at 405 F. Supp. 642 (S.D.N.Y. 1975), and is reproduced in Appendix B of this petition.

JURISDICTION

The jurisdiction of this Court is involved under Section 1254(1), Title 28, United States Code, to review on writ of certiorari the order of the Court of Appeals entered May 24, 1976.

QUESTIONS PRESENTED

1. Whether a determination by the Secretary of Treasury or his delegate as to the existence of jeopardy to the fisc, within the meaning of Section 6861(a), Title 26, United States Code, is subject to judicial review?

2. Was reversible error had when the Court of Appeals, in affirming the order of the United States District Court, Southern District of New York, *de jure* accepted that no evidence need be adduced concerning the good faith belief of the Secretary that jeopardy to the fisc existed when a $7,108,861.73 assessment was made against petitioners, pursuant to Section 6861(a), Title 26, United States Code?

STATEMENT OF FACTS

Petitioners, Andrew L. Stone and M. Jeanne Stone, are husband and wife. On February 7, 1972, the District Director of Internal Revenue, Manhattan District, approved a jeopardy assessment against petitioners, ostensibly under the authority given by Section 6861, Title 26, United States Code, in the

amount of $7,108,861.73. On the same date, a jeopardy assessment was made against Francis Rosenbaum emanating from the same transactions and with respect to the same income.

Notwithstanding that Andrew Stone was incarcerated at the time of the making of the jeopardy assessment, without physical access to his assets, the jeopardy assessment was employed to lien and levy upon substantially all of the assets of Andrew Stone.

The bulk of Andrew Stone's assets, which were levied upon, were being held in escrow, pursuant to an escrow agreement executed on July 24, 1970, between Stone, the United States and St. Louis Union Trust Company, the latter serving as escrow agent.

The escrow agreement was executed to insure the United States an available fund to satisfy potential civil damages asserted against Stone, in litigation commenced against him and others by the United States.[1]

Notwithstanding the escrow agreement and the explicit provision contained therein that the Department of Justice would exercise "its internal efforts to dissuade any other agency of the United States from proceeding by way of attachment or other lien against the property and assets of Stone," the Internal Revenue Service, on the alleged basis that the collection of Stone's income taxes for 1963 through 1967 was in jeopardy,

1. In January 1969, the United States commenced a civil damage action against Stone, among others, in the United States District Court for the Eastern District of Missouri (Civ. No. 69C-24(2)) seeking double damages under the False Claims Act, 31 U.S.C. 231 *et seq.*, or, alternatively, single damages under theories of breach of warranty and payment of public funds by mistake. A similar suit was commenced in the District of Columbia (Civ. No. 230-69).

assessed on February 7, 1972 deficiencies totalling $7,108,861.73 and served a notice of lien on the escrow funds.[2]

On April 6, 1972, following the jeopardy assessment of February 7, 1972, the Internal Revenue Service issues a statutory notice of deficiency to Andrew Stone and M. Jeanne Stone determining deficiencies in tax and additions to tax, pursuant to Section 6653(b), Title 26, United States Code totalling $7,108,861.73 for the years 1963 through 1967, which the Internal Revenue Service has determined was a constructive dividend to Stone. The same such income has also been determined to be taxable to Francis Rosenbaum.

On July 3, 1972, Andrew Stone and M. Jeanne Stone filed separate petitions with the United States Tax Court. Andrew Stone's petition (Docket No. 5311-72) contested each and every allegation set forth in the statutory notice. M. Jeanne Stone's petition (Docket No. 5312-72) also contested each and every allegation set forth in the statutory notice, and further asserted that she was an innocent spouse within the meaning of 26 U.S.C. §6013(e). Issue has been joined in these actions and each is pending before the United States Tax Court for trial.

On August 21, 1974, petitioners commenced an action in the United States District Court, Southern District of New York against the respondents (74 Civ. 3643). The complaint alleged, as is pertinent to this petition, that the jeopardy assessment was made in violation of the self-promulgated guidelines of the Internal Revenue Service, that such assessments came as a direct consequence of newspaper publicity rather than for a tax purpose[3] and that the underlying computations of tax were

2. On March 9, 1976, the Internal Revenue Service served a notice of levy and demand on the St. Louis Union Trust Co., demanding that all accumulated income be turned over to satisfy the outstanding jeopardy assessment. On March 15, 1976, an interpleader action was commenced in United States District Court, Eastern District of Missouri, Eastern Division, Civ. No. 76-236C(1) to determine to whom the funds must be paid over.

3. Articles appeared commencing during the week of January 30, 1972 on a national basis with emphasis in the Washington Post and the St. Louis Post Dispatch questioning why Stone was permitted to receive the income from the escrowed assets.

arbitrary and capricious. Specific requests for relief were an order to be entered requiring respondents to specifically perform the escrow agreement of July 24, 1970; require the respondents to pay Andrew Stone six million dollars in dollars in damages;[4] enjoin the respondents and any agency or employee thereof from in any way collecting upon or seeking to enforce by lien, levy or otherwise, the jeopardy assessments of February 7, 1972 against the petitioners.

On December 11, 1974, respondents filed a notice of motion to dismiss the complaint pursuant to Rule 12(b)(2) and (c) of the Federal Rules of Civil Procedure on the grounds that the court lacked jurisdiction over the subject matter of the action, and that petitioners failed to state a claim upon which relief could be granted. In support of the respondents' notice of a motion, a memorandum of law was submitted. The arguments set forth in the memorandum of law do not disclose what specific facts the respondents possess to have attributed the unreported income of Chromcraft to Andrew Stone, other than to say:

> ". . . and while plaintiffs may claim that the computation of this amount is arbitrary, the statutory notice of assessment, the criminal indictments and guilty pleas and the Tax Court pleadings indicate that this tax claim is not without merit." (Def. B. 24).

Nor is it disclosed in the memorandum of law why a determination of jeopardy was made against petitioners on February 7, 1972.

To attempt to ascertain the specific facts underlying the determination of jeopardy, petitioners served upon the respondents, on March 19, 1975, interrogatories. On April 14, 1975, the parties entered into a stipulation extending the time for

4. On January 15, 1974, petitioners filed a first amended complaint limiting damages to $10,000 in conformity with 28 U.S.C. §1346(a)(2).

response from April 18, 1975 until thirty days after the date on which the court filed an order disposing of the motion to dismiss.[5]

On December 2, 1975, the Honorable Edward Weinfeld issued an opinion (Appendix B) wherein he granted respondents' motion to dismiss for lack of jurisdiction. The substance of the Court's opinion was that the requirements of *Enochs v. Williams Packing & Navigation Company,* 370 U.S. 1 (1961), had not been satisfied by plaintiffs; that the assessments are not wholly without foundation in fact, notwithstanding no evidence was adduced in this regard; that the innocent spouse allegation by M. Jeanne Stone affords no jurisdictional basis for her claim; and, that, as a consequence, the Anti-Injunction Act as set forth in Section 7421(a), Title 26, United States Code bars the maintenance of the suit. The United States Court of Appeals, Second Circuit affirmed the opinion of the District Court (Appendix A).

REASONS FOR GRANTING THE WRIT

The decision of the court below is in conflict with the court's recent opinions in *Laing* and *Shapiro* and the District of Columbia Circuit opinion in *Sherman v. Nash.*

In *Laing v. United States,* 96 S. Ct. 473 (1976) this court held that the requirements of the making of a jeopardy assessment pursuant to Section 6861, Title 26, United States Code, are applicable to a jeopardy termination made pursuant to Section 6851, Title 26, United States Code. Consequently, the failure to follow the prescribed procedures would not preclude a suit to enjoin collection of such tax, the Anti-Injunction provisions of Section 7421(a), Title 26, United States Code being inapplicable.

5. The interrogatories have not as yet been answered.

The rationale of the majority of this court, as it relates to the instant petition is synthesized in footnote 27 of the *Laing* opinion, wherein this court stated:

> "The Anti-Injunction Act, 26 U.S.C. 7421(a), generally bars suits to enjoin the assessment or collection of taxes. But 7421(a) is subject to several exceptions, one pertinent here: it does not forbid suits to enjoin the assessment of a deficiency, or a levy or proceeding in court for its collection, if the taxpayer has not been mailed a notice of deficiency and afforded an opportunity to secure a final Tax Court determination. 6213(a). On the other hand, this exception to the Anti-Injunction Act does not apply to jeopardy assessments made 'as . . . provided in' 6861. Thus jeopardy assessments ordinarily may not be enjoined. *When, however, IRS fails to follow the procedures of 6861 et seq., as in these cases, it is not assessing 'as . . . provided in' 6861, and the 6861 exception to 6213(a) is inapplicable.* In such cases, 6213(a)'s exception to the Anti-Injunction Act becomes operative, and a suit to enjoin the collection of the jeopardy deficiency may be brought." (Emphasis added.) *Supra* at 485-86.

The timely issuance of a statutory notice after making of a jeopardy assessment is but the third procedural step in making and finalizing a valid jeopardy assessment, pursuant to Section 6861(a). The initial procedural step is a good-faith determination by the Secretary of his delegate as to the existence of a belief that jeopardy to the fisc exists; the second step is the actual making of the assessment, and finally comes the issuance of the statutory notice. See Section 6861(a).

If, as this Court stated in *Laing*, the last action required to be taken in the making of a jeopardy assessment, the timely issuance of a statutory notice is subject to judicial scrutiny, then, of necessity all prior procedural steps must be scrutinized before a finding can be made that a valid jeopardy assessment was made "as provided in 6861." Nor does *Commissioner v. Shapiro*, 96 S. Ct. 1062 (1976) detract from petitioners' position. The *Shapiro* case did not involve the question of judicial inquiry into the belief of the Commissioner that jeopardy to this fisc existed, since there was a finding that Shapiro was about to depart this country with his funds. *Supra* at 1067.

If a tax were legally due from Shapiro, his departure with his assets would unquestionably place the collection of such tax in jeopardy. At the time the jeopardy was made against Andrew Stone, he was incarcerated without access to his assets, almost all of which were subject to the escrow agreement.

The District Court in dismissing petitioners' complaint concluded that "the District Director's determination of a jeopardy is not subject to judicial review." *Stone v. United States, supra* at 648-49. This conclusion of law, although finding support in *Durovic v. Commissioner*, 487 F.2d 36 (7th Cir. 1973), *cert. denied*, 417 U.S. 919 (1974); *Transport Mfg. and Equipment Co. v. Trainor*, 382 F.2d 793 (8th Cir. 1967) and *Lloyd v. Patterson*, 242 F.2d 742 (5th Cir. 1957), is contrary to the Third Circuit decision in *Sherman v. Nash*, 488 F.2d 1081 (3d Cir. 1973). In *Nash*, it was held that formalistic compliance with Section 6861(a) is not sufficient to satisfy the requirements of such section. Judicial inquiry is proper to ascertain whether a jeopardy assessment was utilized for nontax motives, and Section 7421(a) does not preclude the same. *Supra* at 1084.

Permitting the *per curiam* affirmance of the District Court's opinion and that of the Fifth, Seventh and Eighth Circuits to stand allots a blank check to the Internal Revenue Service to exercise unbridled discretion involving a confiscatory procedure for any underlying purpose whatsoever, including nontax motives.

Further, if the rationale of the lower court's decision and that of the circuits where such decision derived its foundation is permitted to remain law, an anomoly will be fostered. Under *Laing* and *Shapiro*, a taxpayer is permitted to attack the underlying assessment and collection of asserted income, estate, or gift taxes even though Section 7421(a) states that "no . . . shall be maintained." Yet, a taxpayer will not be permitted to question the basis — the good-faith belief that jeopardy to the revenue in fact exists — that gave rise to the assessment.

The net result would be the elevation of a bureaucratic official — the District Director — to a status higher than either of the coordinate branches of government. A status enabling him to act in any manner he sees fit, regardless of motive, to the extreme detriment of any citizen, without judicial restraint.

CONCLUSION

FOR THE REASONS STATED, it is respectfully prayed that this petition be granted.

Respectfully submitted,

s/ Wallace Musoff
s/ Barry D. Gordon
Attorneys for Petitioners

APPENDIX A — OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of May one thousand nine hundred and seventy-six.

Present:

HON. J. EDWARD LUMBARD

HON. HENRY J. FRIENDLY

HON. JAMES L. OAKES

Circuit Judges,

Andrew L. Stone and Jeanne Stone,

Plaintiffs-Appellants,

v.

United States of America and District Director of Internal Revenue, Manhattan District,

Defendants-Appellees.

76-6018

Appeal from the United States District Court for the Southern District of New York.

Appendix A — Opinion of the Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO
Clerk
By Vincent A. Carlin
Chief Deputy Clerk

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ANDREW L. STONE and M. JEANNE STONE,

Plaintiffs,

-against-

UNITED STATES OF AMERICA and DISTRICT DIRECTOR OF INTERNAL REVENUE, MANHATTAN DISTRICT,

Defendants.

Appendix B — Opinion of the United States District Court

U.S. District Court
Filed
Dec. 2, 1975
S.D. of N.Y.

74 Civil 3643

WAGMAN, CANNON & MUSOFF, P.C.
136 East 57th Street
New York, New York

Attorneys for Plaintiffs

WALLACE MUSOFF, ESQ.
Of Counsel

PAUL J. CURRAN, ESQ.
United States Attorney for the
Southern District of New York
United States Courthouse
Foley Square
New York, New York

Attorney for Defendants

WILLIAM G. BALLAINE, ESQ.
Assistant United States Attorney
Of Counsel

EDWARD WEINFELD, D.J.

Plaintiffs, Andrew L. Stone and M. Jeanne Stone, husband and wife, commenced this action against the United States of America and the District Director of Internal Revenue for a judgment (1) enjoining the defendants from enforcing, by lien,

levy or otherwise, a jeopardy assessment made against plaintiffs for income deficiencies, interest and penalties totalling $7,108,861.73 for the taxable years 1963 through 1967; (2) directing specific enforcement of an escrow agreement dated July 24, 1970, by causing the release to plaintiff Andrew L. Stone of income from escrow assets which has not been paid to Stone by reason of defendants' enforcement of the jeopardy assessment; and (3) awarding damages in the sum of $10,000 in favor of plaintiff Andrew L. Stone for breach of the escrow agreement.

The matter is now before the court on defendants' motion to dismiss the complaint pursuant to Rules 12(b)(2) and (b)(6) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and for failure to state a claim on which relief can be granted.

In 1968 Andrew L. Stone, who was the principal stockholder and chief executive officer of a corporation engaged in the production of rocket launchers pursuant to contracts with the Department of the Navy, was indicted in the United States District Court for the District of Columbia. The thirty-count indictment charged him, the corporation, Francis N. Rosenbaum (its special counsel and a director) and others with conspiracy and substantive crimes to defraud the government through the presentation of false and fictitious invoices and statements and the receipt of kickbacks. Stone pleaded guilty to the conspiracy count and seven substantive counts. Rosenbaum also pleaded guilty to the conspiracy charge, as well as other counts.

In 1969 plaintiff Stone was again indicted with others in the United States District Court for the Eastern District of Missouri and charged with violations of and conspiracy to violate the Munitions Control Act by exporting arms, ammunition and implements of war without government approval and by the use

of false statements. He was convicted upon his plea of guilty to the crime of conspiracy.

In 1969 the government commenced two separate civil actions, one in the Eastern District of Missouri and the other in the District of Columbia, against Stone and the corporations of which he was the principal shareholder, based in large measure upon the fraudulent and criminal acts committed by Stone and his co-conspirators. The complaints generally alleged various claims under the False Claims Act[1] and the Anti-Kickback Act[2] for breach of warranty, recoupment of public funds paid by mistake and declaration of a constructive trust. Damages were sought in the sum of over $6,000,000 and double that amount for violation of the False Claims Act.

Thereafter, in an effort to assure that sufficient assets of Stone would be available to satisfy any judgment which the government might recover upon its civil claims and to avoid attachment by it against his property and assets, Stone and the government entered into an escrow agreement. Under its terms, pending the disposition of the civil suits, Stone deposited $2,500,000 par value short term securities and the shares of a wholly owned corporation in escrow with the Trustee named in the agreement. The securities constituted some but not all of his assets. The agreement provided that any dividend or interest received by the Trustee upon the securities was to be credited to Stone's account with the Trustee. It is this provision which plaintiffs seek to have specifically enforced, among other relief.

In addition to the two government civil actions, four separate civil actions by individual plaintiffs were commenced in United States district courts against Stone and others associated with him, alleging securities law violations based generally upon

1. 31 U.S.C. §§231-35.

2. 41 U.S.C. §§51-54.

the fraudulent conduct which was the subject of the criminal charges. Those six actions were transferred to the District of Columbia for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C., section 1407.[3] In addition to the transferred actions, other civil suits against Stone were commenced in various state courts.

It is against this background that on February 7, 1972 the Internal Revenue Service made the jeopardy assessment against Stone and his wife for income tax deficiencies for the tax years 1963 through 1967. Notice with a schedule detailing the computation of the deficiencies and additions for fraud[4] was duly sent to plaintiffs within sixty days of the making of such assessment.[5] In July 1972 each filed a petition in the United States Tax Court seeking a redetermination of the deficiencies and additions assessed.[6] Plaintiff M. Jeanne Stone in that proceeding contends she is an "innocent spouse" and as such is not liable for any alleged deficiency.[7]

In August 1974, during the pendency of the Tax Court proceeding, which is at issue and undetermined, plaintiffs commenced this action. In their amended complaint they allege five separate claims for relief: (1) that the United States breached the escrow agreement by filing the jeopardy assessment against the plaintiffs, thereby causing the escrow agent to withhold from Andrew Stone the income derived from escrow assets;[8] (2) that

3. *In re* Alsco-Harvard Fraud Litigation, 325 F. Supp. 315 (J.P.M.L. 1971).

4. *See* 26 U.S.C. §6653(b).

5. *See* 26 U.S.C. §6861(b). There is no contention that the notice procedure required under this provision was not complied with by the Service.

6. *See* 26 U.S.C. §6213(a).

7. *See* 26 U.S.C. §6013(e).

8. While the amounts withheld are substantially in excess of $10,000, plaintiffs' prayer for relief is limited to $10,000 in light of the limitations of the Tucker Act, 28 U.S.C. §1346.

the jeopardy assessment was made arbitrarily, in bad faith, and in violation of the Internal Revenue Service's own guidelines in order to bring pressure against Andrew L. Stone, then incarcerated upon the criminal charges, to settle the civil actions brought by the government, rather than to safeguard any revenue that might be due and owing to the government; (3) that the jeopardy assessment was arbitrary and capricious and made in violation of plaintiffs' right against unreasonable seizures under the Fourth Amendment and of their due process rights under the Fifth Amendment; (4) that the computations underlying the assessment were made arbitrarily and in violation of the due process clause of the Fifth Amendment; and (5) that plaintiff M. Jeanne Stone is an innocent spouse who is entitled to be relieved of the tax deficiency assessment. Plaintiffs allege jurisdiction under 28 U.S.C., sections 1331, 1340 and 1346(a)(2).

The essence of plaintiffs' various claims, however phrased, is that the jeopardy assessment was imposed arbitrarily and capriciously and not to collect taxes that were due. The government, in support of its motion to dismiss, contends that this court is without jurisdiction since 26 U.S.C., section 7421(a), insofar as pertinent, provides:

> ". . . [N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

The essential purpose of this anti-injunction provision is to enable the government to assess and collect taxes allegedly due as expeditiously as possible without judicial intervention. Those challenging a deficiency assessment may litigate its legality either by petition to the Tax Court[9] (which, as noted, plaintiffs here

9. 26 U.S.C. §§6212, 6213.

have submitted) or, upon payment of the tax and denial of a refund, by a refund action in the federal district court,[10] or by asserting a claim in the Court of Claims.[11]

Despite the absolute jurisdictional bar of section 7421(a), the Supreme Court, in *Enochs v. Williams Packing & Navigation Company,*[12] held that a suit for injunctive relief against tax assessment or collection may be maintained where, on the basis of information available to the government at the time of the suit and under the most liberal view of the law and the facts, (1) "it is clear that under no circumstances could the Government ultimately prevail" and (2) "equity jurisdiction otherwise exists" because of irreparable injury and lack of an adequate remedy at law.[13] Unless both conditions are met, the court is without jurisdiction and a suit for preventive injunctive relief must be dismissed.

The Supreme Court, in a series of recent cases,[14] reiterated the stringent force of the anti-injunction standards of *Williams Packing,* which it described as "the capstone to judicial construction of the Act,"[15] by refusing to engraft further exceptions based upon claims of alleged irreparable injury pending resort to alternative remedies and alleged denial of due process by reason thereof — in sum, the court interpreted *Williams Packing* to warrant injunctive relief only upon a

10. 26 U.S.C. §7422; 28 U.S.C. §1346.

11. 28 U.S.C. §1491.

12. 370 U.S. 1 (1961).

13. 370 U.S. at 7.

14. United States v. American Friends Serv. Comm., 419 U.S. 7 (1974); Bob Jones Univ. v. Simon, 416 U.S. 725 (1974); Alexander v. "Americans United" Inc., 416 U.S. 752 (1974).

15. *Bob Jones,* 416 U.S. at 742.

showing "that the Service's action is plainly without a legal basis," and that it has "no chance of success on the merits."[16] Thus, plaintiffs have a heavy burden to sustain their claim for judicial intervention with respect to the challenged jeopardy assessment.

To establish that they come within the rigid exceptions of *Williams Packing,* the plaintiffs in substance contend that the jeopardy assessment was made arbitrarily and capriciously by the Internal Revenue Service for punitive purposes and in the guise of a tax which it knew was not due; that the same items of income attributed to plaintiff Andrew L. Stone were attributed to his co-conspirator Francis M. Rosenbaum; that the purpose of the jeopardy assessment was not to collect or preserve the revenue, but to pressure plaintiffs into settling the civil actions, in violation of the escrow agreement; and that the assessment was imposed to satisfy the press, which had been questioning why plaintiff Andrew L. Stone, then serving a prison term upon his convictions, was permitted to receive the income from the escrow assets. Plaintiffs further charge that as the net result of this alleged conduct by the Service they have been denuded of their assets and unconstitutionally deprived of their property and the means to resist the Service's deficiency assessment, or to defend the numerous other litigations in which Stone is named as a defendant. Accordingly they claim they have satisfied both standards of the *Williams Packing* jurisdictional test.

Plaintiffs' conclusory allegations and general charges of "arbitrary and capricious" conduct attributed to the Service must be tested against the *Williams Packing* requirement that it must be "clear that under no circumstances could the government ultimately prevail." While plaintiffs contend that the assessment was inspired by base motives on the part of the Service, unrelated to taxes that were due, the deficiency determination was not drawn out of thin air. Both the criminal

16. *Bob Jones,* 416 U.S. at 745.

and civil damage actions furnish a substantial foundation to support the claim for additional taxes beyond those reported by plaintiffs in their tax returns for the years in question. The criminal charges involved inflated or fictitious invoices, false purchase orders for component parts of rocket launchers, fictitious service kickbacks, dummy corporations and the use of foreign names to conceal the deposit in Swiss bank accounts of funds fraudulently obtained. The government's contention is that the amounts of which it was defrauded were diverted by Andrew Stone to his personal use and constituted income attributable to him by way of constructive dividends, which, together with items that were disallowed in the tax returns, reflected additional income of $6,835,790 upon which taxes were due. According to the District of Columbia indictment, the total of the rocket launcher contracts awarded to the corporation headed by Stone and of which he was the principal shareholder exceeded $47,000,000. The amounts diverted thereon by the fraudulent practices in the period from July 1963 to March 1, 1966, were alleged to have exceeded $4,000,000, which does not include interest and tax penalties. The amount of the tax deficiencies as claimed by the Internal Revenue Service is $4,739,241.14, and the addition for fraud is $2,369,620.59, a total in excess of $7,000,000.

While this court is not called upon to pass upon the merits of the claim for additional taxes due or plaintiffs' resistance thereto, clearly it cannot be contended that the deficiency assessments are without substance or were not made in good faith.[17] In assessing the additional taxes, the Service made a

17. *Compare* Aguilar v. United States, 501 F.2d 127 (5th Cir. 1974); Willits v. Richardson, 497 F.2d 240 (5th Cir. 1974); Lucia v. United States, 474 F.2d 565, 573-75 (5th Cir. 1973); Pizzarello v. United States, 408 F.2d 579 (2d Cir.), cert. denied, 396 U.S. 986 (1969); Rinieri v. Scanlon, 254 F. Supp. 469 (S.D.N.Y. 1966), *with* Iannelli v. Long, 487 F.2d 317 (3d Cir.), cert. denied, 414 U.S. 1040 (1973); Westgate-California Corp. v. United States, 496 F.2d 839 (9th Cir. 1974); Cole v. Cardoza, 441 F.2d 1337 (6th Cir. 1971); Collins v. Daly, 437 F.2d 736 (7th Cir. 1971); Williams v. Wiseman, 333 F.2d 810 (10th Cir. 1964); Vuin v. Burton, 327 F.2d 967 (6th Cir. 1964); Botta v. Scanlon, 314 F.2d 392 (2d Cir. 1963); Hamilton v. United States, 309 F. Supp. 468, 472-73 (S.D.N.Y. 1969), *aff'd*, 429 F.2d (2d Cir. 1970), *cert. denied*, 401 U.S. 913 (1971).

computation for each year specifying each item of additional income and unallowable deductions upon which it claimed deficiency taxes were due.

The tax deficiency assessment is entirely independent of the government's claims in the civil actions against Stone, wherein the government seeks to recover in excess of $6,000,000. The covenant in the escrow agreement related solely to that action and was entered into by Stone to avoid attachment of his assets and property in that action. While the agreement provides that the dividend income of the escrowed securities is to be credited to plaintiff Andrew L. Stone and that the Civil Division of the United States Department of Justice will not institute attachment proceedings against his property and assets and will use its best efforts to dissuade any other agency of the United States from proceeding by way of attachment or other lien against his property, this, of course, did not immunize Stone from tax liability or foreclose the Internal Revenue Service from taking appropriate steps to assess a deficiency and to make a jeopardy assessment to reach his assets, including the income from the escrowed securities. The deficiency tax claims and the jeopardy remedies available to the Internal Revenue Service were entirely separate from the claims and remedies which the Justice Department was asserting under the False Claims and Anti-Kickback Acts.

Plaintiffs also urge that the assessment was illegal because the District Director did not entertain a good faith belief that collection of the taxes would be jeopardized by delay, but rather acted to coerce plaintiffs into a settlement of the civil actions or to respond to a clamorous public press. A good faith belief that tax collection is in jeopardy, plaintiffs argue, is required under section 6861(a) of the Internal Revenue Code, and in its absence the assessment is illegal. This claim, which plaintiffs contend is not subject to the rigid limitations of the *Williams Packing* doctrine because of express exceptions in sections 7421(a) and

6213(a),[18] is, without passing upon their contention, also without merit. The District Director had the right, and indeed the duty, to protect the public fisc against delay in the payment of the alleged additional taxes, collection of which might well have been jeopardized by the prospect of judgments in favor of third parties in the various pending civil actions against Stone. The broad discretion vested in the District Director to make a jeopardy assessment where he believes that the ultimate collection of the tax will be jeopardized by delay must be viewed against plaintiff Andrew L. Stone's entire course of fraudulent conduct with respect to the government contracts over an extended period and his use of Swiss bank accounts to conceal his derelictions. So viewed, it cannot be said that the assessment is wholly without foundation in fact. To contend, under the facts here presented, that the District Director's concern for the collection of a potential deficiency of $7,000,000 was feigned borders on the fatuous. Even assuming that the jeopardy assessments were made, as plaintiffs contend, to coerce them into a settlement of the civil actions or in response to a clamorous public press, the assessments would still rest on an independent solid basis.[19] In any case, the clear weight of the

18. Section 7421(a) bars suits for the purpose of restraining the assessment or collection of any tax "[e]xcept as provided in sectio[n] 6213(a) . . . ." Section 6213(a) forbids any assessment upon United States taxpayers for a 90-day period following the mailing of a deficiency notice, and, if the taxpayer files a petition for redetermination with the Tax Court within those 90 days, the prohibition upon assessments continues until a final decision of the Tax Court. If the Service does attempt to assess or levy upon a tax deficiency within the prohibited period the protection of the Anti-Injunction Act is withdrawn; the last sentence of section 6213(a) provides that in such event, "[n]otwithstanding the provisions of section 7421(a)," the assessment, levy, or other proceeding "may be enjoined by a proceeding in the proper court." An express exception is made, however, for jeopardy assessments under section 6861. Petitioners here, by arguing that the Service did not entertain a good faith belief that the collection of additional taxes was in jeopardy, take the position that the assessments were not made in compliance with section 6861(a) and that section 6213(a) therefore permits this court to issue an injunction.

19. *Cf.* Bob Jones Univ. v. Simon, 416 U.S. 725, 740 (1974); Iannelli v. Long, 487 F.2d 317, 318 (3d Cir.), *cert. denied*, 414 U.S. 1040 (1973).

judicial authority is to the effect that the District Director's determination of a jeopardy is not subject to judicial review.[20]

The plaintiffs' claim to injunctive jurisdiction also founders on the issue of alleged irreparable injury based upon their contention that the jeopardy assessment "stripped them of their liquid assets and [they] are unable to defend themselves against an onslaught of litigation by the United States involving millions of dollars and consequently face complete financial ruin." The short answer is that the Supreme Court explicitly has held that the Anti-Injunction Act may not be evaded "merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise."[21] Plaintiffs' attempt to hold on to jurisdiction by bootstrapping this claim to one of denial of due process of law under the Fifth Amendment and violation of their rights against unlawful seizures is equally unavailing. The Supreme Court has stated that "decisions of this Court make it unmistakably clear that the constitutional nature of a taxpayer's claim, as distinct from its probability of success, is of no consequence under the Anti-Injunction Act."[22] A similar due process of law argument, based upon irreparable injury pending resort to alternative and allegedly inadequate judicial procedures for review was "dismissed out of hand . . . nearly 60 years ago" by the Supreme Court, which recently found "such arguments no more compelling now than then."[23]

20. *See, e.g.*, Durovic v. Commissioner, 487 F.2d 40 (7th Cir. 1973), *cert. denied*, 417 U.S. 919 (1974); Transport Mfg. & Equip. Co. v. Trainor, 382 F.2d 793, 799 (8th Cir. 1967); Lloyd v. Patterson, 242 F.2d 742, 744 (5th Cir. 1957). *But see* Sherman v. Nash, 488 F.2d 1081, 1084 (3d Cir. 1973).

21. Enochs v. Williams Packing Co., 370 U.S. 1, 6 (1962). *Accord*, Bob Jones Univ. v. Simon, 416 U.S. 725, 742 (1974).

22. Alexander v. "Americans United" Inc., 416 U.S. 752, 759 (1964).

23. Bob Jones Univ. v. Simon, 416 U.S. 725, 746 (1974). *See* Dodge v. Osborn, 240 U.S. 118, 122 (1916).

So, too, the fact that the wife alleges she is an "innocent spouse" affords no jurisdictional basis for her claim.[24] She filed a joint tax return with her husband and is jointly and severally liable for any tax due.[25] Accordingly, she, too, is barred from maintaining this suit under section 7421(a). The fact that she may ultimately prevail upon her contention creates no exception thereunder.

Plaintiffs advance a number of other contentions which require no more than mention and may readily be disposed of. As to the claim that the Service attributed the same income to Francis Rosenbaum, Stone's co-conspirator, it is settled that, pending collection of the taxes alleged to be due, the Service is permitted to assert inconsistent positions and to assess deficiencies against more than one person for the same tax liability if there is an accepted legal basis for each assertion.[26]

Finally, plaintiffs contend that the jeopardy assessments were made in violation of the Internal Revenue Service's self-promulgated guidelines.[27] Even were it to be accepted that the District Director did not follow the Service's guidelines, this

24. *See* Kirtley v. Bickerstaff, 488 F.2d 768, 770 (10th Cir. 1973), *cert. denied*, 419 U.S. 828 (1974).

25. 26 U.S.C. §6013(d)(3).

26. Weils v. Commissioner, 499 F.2d 255, 259 (10th Cir.), *cert. denied*, 419 U.S. 966 (1974); Estate of Goodall v. Commissioner, 391 F.2d 775, 782-84 (8th Cir.), *cert. denied*, 393 U.S. 829 (1968).

27. Internal Revenue Manual §5214.21 provides for a jeopardy assessment where, *inter alia:*

> "(a) The taxpayer is or appears to be designing quickly to place his property beyond the reach of the Government either by removing it from the United States, or by concealing it, or by transferring it to other persons, or by dissipating it.
>
> "(b) The taxpayer is, or appears to be designing quickly to depart from the United States, or to conceal himself.

would not vest the district court with jurisdiction to issue an injunction, contrary to the specific prohibition contained in the Anti-Injunction Act, which manifests a strong congressional policy against judicial intervention.

The complaint is dismissed for lack of jurisdiction. The dismissal also applies to the claim alleged to be for breach of contract, since the prayer for specific performance of the agreement affects the assessment or collection of taxes. However, the dismissal of that claim is without prejudice to the commencement by plaintiffs of a new action for breach of contract against the government (not against the District Director) in the sum of $10,000, or alternatively, with leave to plaintiffs, if so advised, to serve an amended complaint against the government in this action limited to a claim solely for breach of the alleged agreement in the sum of $10,000.

Dated: New York, N.Y.
December 2, 1975

EDWARD WEINFELD
United States District Judge

(Cont'd)

> "(c) The taxpayer's financial solvency is or appears to be imperiled. (This does not include cases where the taxpayer becomes insolvent by virtue of the accrual of the proposed assessment of tax, penalty and interest.)"

Supreme Court, U. S.
FILED
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No. 76-217

In the Supreme Court of the United States

OCTOBER TERM, 1976

ANDREW L. STONE AND M. JEANNE STONE, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners seek review of the decision in this federal income tax case that their suit to enjoin the collection of a jeopardy assessment was barred by the Anti-Injunction Act, 26 U.S.C. 7421(a).

The pertinent facts are as follows: Pursuant to his authority under 26 U.S.C. 6861, on February 7, 1972, the Commissioner of Internal Revenue made a jeopardy assessment of income taxes against petitioners for the years 1963 through 1967 of $7,108,861.73 (Pet. 2-3; Pet. App. B 6a; JA 6, 18, 48).[1] On April 6, 1972, the Commissioner issued a statutory notice of deficiency, with an attached five-page computational schedule (Pet. 4; Pet. App. B 6a; JA 18, 48-53). Petitioners thereupon filed separate petitions in the

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[1] "JA" refers to the joint appendix filed in the court of appeals.

United States Tax Court for redeterminations of their tax liabilities. The Tax Court cases are still pending (Pet. 4; Pet. App. B 6a).

More than two years later, petitioners instituted this suit in the United States District Court for the Southern District of New York, seeking: (1) an injunction against the enforcement of the jeopardy assessment; (2) payment of interest income on assets placed in escrow; and (3) $10,000 in damages for alleged breach of an escrow agreement with the United States, which provided that the Civil Division of the Department of Justice would "use its best internal efforts to dissuade any other agency of the United States from proceeding by way of attachment or other lien against the property and assets of Stone" (Pet. 5; JA 11, 44). The principal allegation in petitioners' complaint was that the Commissioner's determination that the collection of the taxes was in jeopardy was made in bad faith to force petitioner Andrew L. Stone to settle other civil actions brought by the government and that the computations underlying the assessment were arbitrary and capricious (Pet. 4-5; Pet. App. B 6a-7a).

The district court dismissed the suit as barred by the Anti-Injunction Act, 26 U.S.C. 7421(a), which prohibits suits to enjoin the assessment and collection of any tax. The district court further held that there was a substantial basis for the jeopardy assessment, that the determination that jeopardy existed was made in good faith, and that the Commissioner's determination of jeopardy is not subject to judicial review (Pet. 6; Pet. App. B 9a-15a). The court of appeals affirmed by order (Pet. App. A 1a-2a).

1. Section 6861 of the Internal Revenue Code of 1954 empowers the Commissioner of Internal Revenue to take immediate steps to assess and collect a deficiency if he believes that the collection of the taxes will be jeopardized

by delay. *Transport Manufacturing & Equipment Co. of Del.* v. *Trainor*, 382 F. 2d 793, 799 (C.A. 8). The Commissioner's determination that collection will be jeopardized by delay is not subject to judicial review. *Transport Manufacturing & Equipment Co. of Del.* v. *Trainor, supra; Field* v. *United States*, 263 F. 2d 758 (C.A. 5), certiorari denied, 360 U.S. 918; *Lloyd* v. *Patterson*, 242 F. 2d 742 (C.A. 5). These decisions are in accord with the legislative history of Section 279(a) of the Revenue Act of 1926, 44 Stat. 59, the predecessor of Section 6861 of the Code. The pertinent Committee Report stated (S. Rep. No. 52, 69th Cong., 1st Sess. 27 (1926)): "It should be observed that the [Board of Tax Appeals] and the appellate courts have no authority to examine into the question as to whether the jeopardy determined by the commissioner in fact exists."

Petitioners contend (Pet. 6-9) that the decision below conflicts with *Laing* v. *United States*, 423 U.S. 161, and *Commissioner* v. *Shapiro*, No. 74-744, decided March 8, 1976. But neither *Laing* nor *Shapiro* held that a determination of jeopardy by the Commissioner of Internal Revenue was subject to judicial review. In *Laing*, the Court ruled that the Commissioner was required to issue a notice of deficiency in connection with his termination of a taxpayer's taxable year under Section 6851. *Shapiro* holds that where a taxpayer subject to a jeopardy assessment under Section 6861 shows irreparable injury and the basis of the assessment is not disclosed, the district court has jurisdiction to determine the applicability of the exception to the Anti-Injunction Act that exists where "under no circumstances" would the government prevail on the merits of its claim. See *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 7.

Here, however, petitioners had received the deficiency notice within the time prescribed by Section 6861(b) (Pet. 4; Pet. App. B 6a), were fully apprised as to how the tax

was determined (Pet. 4; Pet. App. B 6a; JA 18, 48-53) and there had been a showing, through affidavit and exhibits, of the basis of the deficiency (Pet. App. B 9a-11a; JA 13-72). See *James* v. *United States*, 510 F. 2d 860 (C.A. 6), judgment vacated and remanded to the court of appeals for further consideration (No. 74-1420, March 22, 1976) in the light of *Commissioner* v. *Shapiro*, *supra*, original opinion affirmed, September 9, 1976, C.A. 6, No. 74-1867.

2. Petitioners further argue (Pet. 8) that the decision below conflicts with *Sherman* v. *Nash*, 488 F. 2d 1081 (C.A. 3). There, the court held that in a suit to enjoin collection of taxes, a district court is not barred by the Anti-Injunction Act from considering whether the only purpose of the jeopardy assessment was "to harass and coerce [the taxpayer] for improper purposes" (488 F. 2d at 1084). But the court in *Sherman* specifically stated that it fully concurred "with those courts which have concluded that Congress withheld jurisdiction from the district courts to review the sufficiency of the facts relied upon by the IRS to support a belief that jeopardy exists" (*ibid.*) and recognized that the existence of the required tax collection interest was sufficient to make the Anti-Injunction Act applicable. See *Iannelli* v. *Long*, 487 F. 2d 317 (C.A. 3), certiorari denied, 414 U.S. 1040.

At all events, the district court here specifically concluded (Pet. App. B 12a) that "it cannot be said that the assessment is wholly without foundation in fact." As the court further stated (*ibid.*): "To contend, under the facts here presented, that the District Director's concern for the collection of a potential deficiency of $7,000,000 was feigned borders on the fatuous." In so holding, the district court relied upon the government's affidavit (and exhibits attached thereto) which showed that petitioner Andrew L. Stone had pled guilty to using two corporations as vehicles for fraud and receipt of kickbacks (JA 15, 22-38) and

had diverted over four million dollars in illegally obtained payments into Swiss bank accounts in which he had an interest (JA 29-30). Under these circumstances, there is no basis to petitioners' claim that the tax assessment lacked an independent basis but was made solely to coerce them into settlement of their civil actions against the government.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1976.